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In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Seattle 1, Washington

FRATT PRINTING COMPANY

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DAVID D. BECK, *Petitioner*

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. JURISDICTION

A. Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals is reported at 292 F.2d p. 622. This opinion is reproduced in the appendix hereto.

B. Abbreviations Used Herein

The pretrial proceedings (other than pretrial exhibits consisting of newspaper and magazine clippings) are contained in a printed Transcript of Record. References to this Transcript are designated herein by the abbreviation R.

The Trial Court ordered that the Transcript of the trial proceedings be submitted to the Court of Appeals in typewritten form. References to the typewritten Transcript are designated herein by the abbreviation Tr.

This case involves alleged violations of § 145(b) of the Internal Revenue Code (26 U.S.C. § 145(b)). The counts of the indictments which charged violation of these counts are designated herein as the "tax evasion counts." The case also involves alleged violations of § 3793(b)(1) of the Internal Revenue Code (26 U.S.C. § 3793(b)(1). This section defines the offense of making false returns for tax exempt organizations. This form of return is frequently referred to as a form 990 return. The counts involving this statute are referred to herein as the 990 counts.

C. Nature of the Case

Petitioner was convicted in the District Court on four counts of tax evasion and two counts of procuring and making false 990 returns.

The Court of Appeals reversed the convictions and granted a new trial on the tax evasion counts but affirmed the counts which charged the procuring and making of false 990 returns.

There were two indictments, joined for trial. R. 3, 435. Two counts, charging conspiracy to evade taxes, were severed for trial and are not involved in this Petition. One count charging the procurement and making of a false 990 return for the year 1951, was dismissed by the Government at the commencement of the trial. Tr. 237.

D. Date of Judgment Sought to be Reviewed

On February 27, 1959 Petitioner was adjudged guilty on the aforesaid counts and was sentenced by the District Court to imprisonment for a period of five years on each count, the sentences to run concurrently, and was fined the sum of $10,000.00 on each count.

The opinion of the Court of Appeals was filed on March 7, 1962.

E. Denial of Rehearing and Extension of Time

After argument in this case in the Court of Appeals, the Court withheld the decision pending the decision of this Court in *James v. United States*, 366 U.S. 213. Following that decision the Court of Appeals ordered reargument. Upon reargument Petitioner contended that the conviction of Petitioner on the tax evasion counts should be reversed or, in the alternative, that a new trial should be granted on these counts. Petitioner also contended that the conviction on the 990 counts should be reversed and a new trial granted because, in the light of the *James* decision, the evidence consisted almost entirely of alleged acts of embezzlement and other misconduct on the part of Petitioner, none of which related to the 990 counts; and Petitioner argued that it would have been impossible for the jury to have separated this highly prejudicial evidence from the minimal portion of the evidence which related to the 990 counts.

In its decision after reargument, the Court of Appeals granted a new trial on each of the tax evasion counts but affirmed the 990 counts. The Court did not discuss Petitioner's contention that a new trial should be granted on the 990 counts.

Thereafter, a Petition for Rehearing was submitted to the Court of Appeals and this Petition was denied on March 7, 1962.

On March 26, 1962 this Court extended to April 30, 1962 the time for the filing of this Petition.

F. Statutory Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 (62 Stat. 928).

G. Questions Presented for Review

A principal question in this case is whether the United States, while conducting criminal proceedings against one of its citizens, may, in Congressional proceedings, simultaneously and with knowledge of the criminal proceedings, expose the citizen to public contempt and disgrace and publicly assert his guilt. This question, to our knowledge, has not heretofore been decided by this Court. The vital importance of this question to the integrity of judicial proceedings is apparent, and its application is not limited to the Petitioner in this case.

Specifically, the questions sought to be reviewed are:

Question No. 1

While the United States is conducting grand jury proceedings directed against a specified person, does the Constitution (and particularly the Fifth and Sixth Amendments thereto) permit the United States, with notice of such proceedings: to accuse and degrade the citizen; to require him to continually assert a Constitutional privilege which is regarded by the public as an admission of guilt;

to assert that he is guilty of crimes; and to disseminate such accusations, assertions and proceedings by all types of news media in the area where the grand jury proceedings are being conducted?

Question No. 2

When criminal proceedings brought by the United States are pending against a citizen, and where such proceedings include secret grand jury sessions and secret deliberations, and the selection of jurors with respect to whom subconscious influences cannot be measured, and when the United States simultaneously degrades and asserts the guilt of that citizen in public Congressional proceedings, is the burden upon the accused citizen to prove by direct evidence that the public accusations and declarations of guilt, disseminated by and as a result of the Congressional proceedings, have affected the judicial proceedings?

Question No. 3

When criminal proceedings brought by the United States are pending against a citizen, and after an indictment against the citizen has been returned, may the United States prevent the citizen from exercising his right to a speedy trial by the continued widespread and intensive publication of reports which degrade the citizen and by assertions that the citizen is guilty?

Question No. 4

Was the Petitioner's right to a fair and impartial trial violated by the denial of Motions for Continuance and Change of Venue, where the Unit-

ed States Senate, knowing of pending criminal proceedings against the Petitioner, caused inflamatory and prejudicial statements against Petitioner to be widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, particularly in the District in which the trial was held, commencing prior to the indictment of Petitioner and continuing until the date of trial?

Question No. 5

Where it was charged that Petitioner did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation of false form 990 returns, was it a denial of due process to submit the case to the jury and affirm conviction, where there was no evidence that Petitioner saw or signed the returns or knew of their preparation and existence, and no evidence that he performed any act whatsoever in connection with the procurement, preparation or presentation of the returns?

Question No. 6

In a trial which continued for approximately three months, in which Petitioner was charged with four counts of tax evasion and two counts of procuring and making false 990 returns, and where approximately 95 per cent of the evidence related to conduct of Petitioner which was submitted to the jury on the theory that it consisted of acts of embezzlement and other misconduct and where it was subsequently determined by decision of this Court that a conviction for tax evasion based upon embezzlement may not stand, resulting in a new trial

on the tax evasion counts in this case, was it error and a denial of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States for the Court of Appeals to grant a new trial on the false return counts but deny a new trial on the 990 counts, without consideration of whether the evidence of embezzlement and other misconduct may have prejudiced the jury in its deliberations on the 990 counts?

II. Applicable Constitutional Provisions and Statutes

The Fifth Amendment to the Constitution of the United States provides in part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

26 U.S.C. § 145 provides:

> (b) *Failure to Collect and Pay over Tax, or Attempt to Defeat Tax.* — Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of

a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U.S.C. 3793(b) provides:

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation* - Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

28 U.S.C. § 1863(b) (62 Stat. 952) provides:

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in fair and impartial administration of justice.

28 U.S.C. § 1865(a) (62 Stat. 952) provides:

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the service. To this end the court may direct the citizens of any part of the district with jury

maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

II. STATEMENT OF THE CASE

A detailed chronology of the events upon which this Petition is based is set forth in the Appendix to this Petition. This chronology includes the dates of the significant proceedings in the District Court and the proceedings of a Committee of the United States Senate. Illustrative excerpts from the Committee proceedings and news comments which accompanied and resulted from the proceedings are also set forth therein.

This is a case in which it is contended that publicity hostile to petitioner, and which would have been inadmissible upon trial, together with subconscious influences arising from such publicity, infected the entire proceedings, from the grand jury investigation to and including the trial.

The case differs from other cases involving publicity which have been considered by this Court. In this case the denunciations and accusations of Petitioner were not by accident nor, contrary to the statement by the Court of Appeals, were these public accusations the result of petitioner's own acts. 298 F.2d 622, 627. The hostile publicity was created and disseminated by the acts of a Committee of the United States Senate. This was done by the Committee with knowledge of the fact that criminal proceedings were pending against petitioner and with notice of the danger that the Committee proceedings would affect the judicial proceedings. Excerpts from the Committee proceed-

ings (which are reproduced in the Appendix) persuasively impel the conclusion that the Committee conducted its proceedings with the purpose of affecting the judicial proceedings.

On February 26, 1957 a United States Senate Committee (designated as the SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD)[1] commenced to hold public hearings concerning alleged activities by officials of the International Brotherhood of Teamsters including particularly the petitioner herein. R. 19. On March 25 and 26, 1957, petitioner was required to appear as a witness before this Committee. R. 28. At the outset of his appearance before the Committee petitioner promptly notified the Committee that he would be required to assert the privilege guaranteed to him by the Fifth Amendment because he was then under investigation for alleged violations of federal laws and because the proceedings were being disseminated throughout the country (including the District in which petitioner was subsequently tried) by all news media, including radio, television and press. R. 28. Nevertheless the Committee propounded repeated questions to petitioner which, upon advice of his counsel, he refused to answer, asserting his privilege under the Fifth Amendment. R. 29. During these interrogations members of the Committee repeatedly criticized petitioner for asserting the privilege against self-incrimination, challenged his right to do so and declared, expressly and impliedly, that he would not have done so had he not been guilty of

[1] The proceedings of this Committee have been published by the United States Government Printing Office. The term "Hearings", with appropriate page references, is used herein to designate these printed proceedings.

some crime. R.20-22; and see excerpts from Committee hearings set forth in Appendix A.

Subsequently, on May 8, 1957 petitioner was required to appear a second time before the Committee. R. 30. On this occasion, petitioner's counsel notified the Committee that an indictment against petitioner had already been returned by a grand jury in Tacoma, Washington. R. 30. The Committee was requested to defer further interrogation of petitioner pending disposition of the indictment. Petitioner's counsel stated that, if the Committee insisted on interrogating petitioner it would be necessary for petitioner to again assert the privilege against self-incrimination. R. 31. The Committee refused the request to defer the interrogations and again propounded questions to petitioner to which he was required to assert the privilege against self-incrimination. R. 35-40. During the proceedings which took place on this date, the Committee publicly announced on television and radio, and released to the press, a compilation of fifty-two items of misappropriation of funds and other misconduct alleged to have been committed by petitioner. Other charges, including charges of theft of hundreds of thousands of dollars, were repeatedly made during the various sessions of the Committee and in press releases and were similarly reported by all news media. R. 71, 77; and see excerpts from Committee proceedings set forth in Appendix A.

The Committee caused all of its proceedings to be publicized by all methods of news communication as well as by means of commentaries in leading magazines with nation-wide circulation. R. 21-22; and see illustrative excerpts set forth in Appendix A. The appearance of petitioner before the Commit-

tee, including his repeated assertions of the Fifth Amendment and the denunciatory comments of the Committee with respect thereto, were telecast and broadcast "live" and by film on both local and national news programs. R. 29, 48, 63, 71, 55-56, 73-78. These broadcasts and telecasts included the proceedings in which petitioner was charged with theft and misappropriation. R. 57, 68, 74. One of the telecasts consisted of the popular "Meet the Press" program during which the Chief Counsel of the Committee stated that petitioner had stolen several hundreds of thousands of dollars from the Teamsters Union. R. 61.

All of the television and radio broadcasts reached audiences in the District from which the grand jurors and trial jurors were selected. R. 50, 63, 72. Expert newscasters testified, in pretrial proceedings, that these accusations reached an unusually large proportion of the radio and television audiences. R. 52-61, 63-69, 78.

The newspapers which carried flamboyant headlines of the denunciations and accusations of the Senate Committee had wide circulation throughout the area from which the grand jurors and trial jurors were drawn. R. 27; and see excerpts in the Appendix A. In addition to the normal circulation, the large-type headlines came to the attention of the public by being displayed prominently on news stands so that the public could read the headlines. R. 27-28.

Both of the indictments in the case were returned in the summer of 1957, at the height of the clamor and furor of public denunciation of petitioner. R. 3, 435. No instruction was given to the grand jurors to disregard the reports of the Senate pro-

ceedings and no inquiry was made to determine the effect of the proceedings upon the attitude of any of the grand jurors. R. 42-43. It is believed that the first indictment, returned on May 2, 1957, involving a complicated charge of tax evasion as well as a 990 count, was returned upon evidence which was submitted at a session which lasted less than one court day. R. 30.

While the Senate proceedings were in progress, the State of Washington commenced criminal proceedings against petitioner for embezzlement of $1900.00. The Senate Committee provided substantial assistance to the State prosecuting authorities in the conduct of this prosecution and the Chief Counsel of the Senate Committee subsequently declared that the conviction of petitioner on the embezzlement charge was a "direct result" of the proceedings of the Senate Committee. R. 22-24, 253.

In the empanelment of the State grand jury, specific reference was made to "testimony" before the Senate Committee to the effect that officers of the Teamsters Union had embezzled hundreds of thousands of dollars of the funds of the Union. R. 24.

The State proceeding against petitioner which were the "direct result" of the Senate proceedings added to the mass of hostile publicity. Petitioner's conviction, in December of 1957; was announced in large headlines as, for example: DAVE BECK GUILTY AS THIEF. Further publicity resulted in February of 1958 upon the sentencing of petitioner to a maximum prison term of fifteen years. These proceedings, like the Senate proceedings, were broadcast, telecast, and reported prominently

in the press. (See illustrative excerpts set forth in Appendix A, p. 28A).

The Senate Committee continued its work in 1958, resulting in continued adverse publicity against petitioner. In March, 1958 the Committee published and circulated two interim reports repeating numerous charges against petitioner, including the accusation that he had embezzled hundreds of thousands of dollars from the Teamsters Union.

Similar publicity continued through the summer and fall of 1958. In the issues of the *Saturday Evening Post* for May 3, 1958 and May 10, 1958, Senator John McClellan, the Chairman of the Senate Committee, published an article viciously attacking petitioner. Some excerpts from the article are set forth at Appendix A, pp. 29A-31A. The following brief quotation illustrates the general tenor of the article:

> "[Petitioner] oppressed and cheated the working members. He plundered their funds on a grand scale by many slick devices . . . But he still clings to his misbegotten wealth."

Hearings of the Committee relating to the Teamsters Union and petitioner's successor as president of the Union continued through the summer and into the fall of 1958 with continuing sensational news coverage. Many of these proceedings involved accusations of corruption, violence, and terror. Reports of conduct of this nature were attributed to petitioner because of his close identification with the Teamsters Union in the State of Washington. R. 248.

Further public attention was focused upon petitioner by the campaign for and against the Wash-

ington State "Right to Work" initiative. During this campaign numerous campaign materials based upon the Senate Hearings were circulated in the press. R. 352.

The adverse publicity relating to petitioner during the months of September, October and November (the trial commenced on November 10, 1958) included the following:

Article in September, 1958 issue of *Readers Digest*:

"WHAT UNION MEMBERS HAVE BEEN WRITING SENATOR McCLELLAN"

"BECK WON'T LEAVE FANCY BIG SEATTLE HOME VERY SOON"

Daily Olympian, September 9, 1958.

From the "Letters to the Editor" column: caption at the top is "The Old Refrain" and letter reads:

"To the Editor:

"If it is possible, I would like to have in print the full 'refrain' or excuse Dave Beck, the teamster, used in refusing to answer questions. Over and over again the same answer. And how many times did he do this?

(signed) A. T. Frivold
1608 So. "M"

"Editor's note:

"Mr. Beck said, 'I must decline to answer the question, because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further I decline to answer because I refuse to give testimony against myself and invoke the fourth and fifth amend-

ments; and further because the question is not relevant or pertinent to the investigation.' "

Tacoma News-Tribune, September 14, 1958.

"U. S. AIDE LASHES BECK ON TRIAL STAND"

Seattle Post-Intelligencer
October 2, 1958

Article in October 10, 1958 issue of *U. S. News & World Report* entitled:

"CAN THE LABOR RACKETEER BE STOPPED?"

includes an interview with Senator McClellan and contains the following statement:

> " 'After nearly two years of investigation, Senator McClellan reports many abuses in handling of union money; many cases of violence, including murder; some giant unions controlled by cliques of gangsters through voting 'gimmicks' "

Photograph of petitioner's home, described as "the notorious home of Dave Beck in Seattle," over large caption

"OVER $300,000 IN UNION DUES WENT INTO THIS HOUSE!"

Seattle Times
Seattle Post-Intelligencer
Centralia-Chehalis Daily Chronicle
Olympia Daily Olympian
October 20, 1958 (R. 355)

Reproduction of following headlines:

"UNION DUES AND ASSESSMENTS 'PAID' FOR THESE HEADLINES"

"BECK'S ARREST ORDERED ON TAX CHARGES"

"DAVE BECK IS CONVICTED: TEAMSTER CHIEF GUILTY OF THEFT"

"BECK PROFIT IN TRUST FUND OF WIDOW TOLD"

Tacoma News-Tribune
Vancouver Columbian
Olympian Daily Olympian
Centralia-Chehalis Daily Chronicle
October 23, 1958 (R. 355-356).

Purported letter from union member stating:

"My reason for supporting 202 is that like millions of others I am thoroughly sick of the Becks, the Hoffas and all other union bosses who use their power for their own personal gain."

Seattle Post-Intelligencer
Vancouver Columbian
Olympia Daily Olympian
October 27, 1958

Statement in large campaign advertisement that "Union bosses" have stolen $10,000,000 in members' dues.

Seattle Post-Intelligencer, November 3, 1958

Campaign advertisement on behalf of Republican candidate for U. S. Senate, stating that the candidate "has actually indicted racketeer labor

bosses!" and that he "wears no Dave Beck collar, or any man's yoke!"

Seattle Post-Intelligencer, November 3, 1958

In the November 1958 issue of *The Atlantic* there was a summary of the proceedings of the Senate Committee containing further repetition of the accusations and denunciations of the Committee. In this article, published just prior to commencement of the trial, it was stated that the Senate Hearings "proved" that petitioner stole from $300,000 to $400,000 of union funds. R. 360-363.

In October 1958 there was published by Simon and Schuster a book entitled "Treasury Agent," by Andrew Tully. The United States Secretary of the Treasury wrote a commendatory foreward to the book. A chapter under the heading "The Cheaters" was devoted to "The Fall of Dave Beck." This chapter again repeated the "findings" of the Senate Committee. R. 330, 336, 340.

Motions for change of venue filed by petitioner were denied. R. 114, 232. Petitioner initially filed motions for brief continuances in the expectation that the Senate Committee would discontinue its activities and that the adverse publicity would abate. When it developed that the publicity was continuing up to and including the very month that the trial commenced, petitioner moved for an indefinite continuance. R. 244. This motion was denied. R. 343.

Thus, on November 10, 1958 the case came to trial, preceded by a prolonged and intensive series of accusations and pronouncements of guilt against petitioner—all stemming directly or indirectly from the Government which had guaranteed to petitioner due process of law, but which had persisted in de-

nouncing and condemning petitioner even after the return of the indictments.

At the outset of the trial, during the *voir dire* examination, all of the jurors were reminded of petitioner's assertion of his privilege against self-incrimination. This occurred when a prospective juror announced that he was biased against petitioner for this reason. (The proceedings are set forth in Appendix A, p. 36A-37A).

III. ARGUMENT

A. *Invalidity of Grand Jury Proceedings*

Petitioner's motions to dismiss on the grounds that the Senate Committee proceedings impaired the function of the grand jury were denied. R. 46, 150, 312.

Basic fairness and impartiality of the tribunal is the keystone of due process of law under the Fifth Amendment. This fundamental requirement was applied, at common law, to the grand jury stage as well as the trial stage of criminal proceedings. See *Field's Charge*, 30 Fed. Cas. 992, No. 18255 (Cir. Ct. Cal. 1872); 1 *Wharton on Criminal Law* (7th ed. 1974), pp. 355, 366, § 452; *United States v. Wells*, 163 Fed. 313 (D. C. Idaho 1908); *United States v. Kilpatrick*, 16 Fed. 765 (D.C.N.Y. 1883). Under the Constitution, this Court has consistently held that the grand jury must be impartially constituted and conducted. Where that standard is breached, the accused's right to due process of law has been violated and the indictment must be dismissed. *Cassell v. Texas*, 339 U.S. 282; *Hoffman v. United States*, 341 U.S. 479; *State v. Pierre*, 306 U.S. 354; Annotation, 94 L. Ed. 856, 857. The grand jury is thus no

exception to the elemental standard of fairness; its function is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused." *Hoffman v. United States*, 341 U. S. 479, 485.

In the present case there can be no doubt that the grand jurors, like virtually the entire populace of petitioner's native area, were violently prejudiced against petitioner by the massive hostile publicity engendered by the Congressional Committee. The grand jury proceedings were conducted amid repeated accusations of crimes, and pronouncements of guilt, made against petitioner by the government. Despite this, the district judge made no effort to instruct the jurors to avoid contact with the publicity or even to disregard it. The surrounding circumstances compel the conclusion that the grand jury was infected with prejudice and hostility against petitioner.

The answer of the court below to the foregoing is that "There was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck. . . . We rule that a specific showing of prejudice is necessary to make erroneous the action of the trial judge in refusing to dismiss the indictment." 298 F.2d 622, 627.

In so ruling, the court below has placed an impossible burden upon petitioner and any other accused similarly situated. The record makes clear that the Congressional Committee deliberately elected to "expose" petitioner's alleged crimes at a time which coincided with the grand jury sessions, and that the resultant publicity was not only "vast" but hostile in the extreme. Nevertheless, it is, of

course, impossible to make "a specific showing of prejudice" in the sense of presenting evidence that individual jurors were affected by the publicity. The grand jury proceedings were and are secret, no *voir dire* examination was available to the accused, and it has not been possible to question any grand jurors at any time.

The effect of the ruling below is to let stand any conviction when a "specific showing of prejudice" is not made no matter how obvious it may be from the surrounding conditions that prejudice existed, and despite the government's use of its right of secrecy so as to make a direct showing impossible.

Such a ruling is manifestly unjust. The Court of Appeals has ignored the rule established by this Court that no direct showing of partiality is required of the defendant, and a conviction cannot stand, where the circumstances show a substantial danger that the jurors were activated by prejudice, even though the prejudice may have been unconscious or unacknowledged. *Marshall v. United States*, 360 U. S. 310; *Irvin v. Dowd*, 366 U. S. 717.

The opinion below attempts to distinguish this case from those involving exclusion of minority groups from the jury panel on the ground that "The civil rights protected in these cases are bigger than the rights protecting any criminal or criminal class from the unfavorable publicity resulting from their own corrupt or illegal acts." 298 F.2d 622, 627. It is submitted that no citizen's federal constitutional right to a fair and impartial grand jury (*Cassell v. Texas*, 339 U. S. 282) is "bigger" than that of any other citizen. See *Hernandez v. Texas*, 347 U. S. 475, 478, note 3. If the Constitution requires the dismissal of an indictment where prejudice is inferred

from the fact of class exclusion, it must require the same result where prejudice is demonstrated as irrefutably as it is in the present case. Further, the court's holding begs the very issue involved in this and every other due process case by assuming petitioner to be a criminal *ab initio*, and hence condemned to a lesser degree of constitutional protection than is afforded to more respectable defendants. In the face of petitioner's express notification to the Congressional Committee that criminal proceedings were pending against him, and of his futile request that his public appearances as a witness be postponed, it cannot fairly be said that the publicity resulted from his own "corrupt or illegal acts." On the contrary, the public hostility to him resulted from the Committee's conscious election to "expose" him regardless of the impact of their actions upon the judicial proceedings.

It has become a matter of widespread concern that Congressional hearings involving accusations and "evidence" of misconduct operate to deprive the citizen of an impartial judicial hearing. See Mr. Justice Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 941; Snee, *The Case Against Televising Congressional Hearings*, 42 Georgetown Law Journal 1; Newman, *Some Facts on Fact Finding by an Investigatory Commission*, 13 Administrative Law Rev. 120, 122. No worse example of this danger has occurred in recent years than the simultaneous attack upon petitioner in 1957-58 by the Senate Committee and the Department of Justice. The public hostility toward petitioner was not the result of the relatively uncontrollable activities of the newspapers, but of the intentional conduct of the Committee, which acted with full foreknowledge of

the results. The denial of impartiality is double repugnant to the Constitution where it is caused by the deliberate activities of an agency of the prosecuting sovereignty. *Delaney v. United States*, 199 F.2d 107 (1 Cir. 1952):

> The issue is thus whether the government, through its legislative branch, may consciously proceed to create an atmosphere of intense public hostility against a citizen who is simultaneously the subject of criminal charges under consideration by a federal grand jury, and may then rely upon the secrecy of the grand jury proceedings to assert that no specific prejudice has been shown. It is submitted that this question is one of basic importance fully justifying the granting of certiorari.

B. *Refusal to Grant Continuance*

Petitioner's motion for continuance, made when it became apparent that the adverse publicity was continuing into November 1958 (R. 244) was denied. R. 343.

The point in this case is that it was the United States itself which generated the hostility toward petitioner and which refused, even after the return of the indictment, to discontinue the activities which created the atmosphere of prejudice against petitioner—even going so far as to write articles for prominent magazines with national circulation.

These facts are strikingly similar to those involved in *Delaney v. United States*, 199 F.2d 107 (1 Cir. 1952), where the court stated:

> "We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the

public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

An identical result was reached in *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), where the pre-trial publicity had been prompted by the activities of a state "crime commission."

The Federal courts have long condemned the extra-judicial transmission to the public, including the prospective trial jurors, of hostile reports concerning a defendant in a criminal case. Mr. Justice Jackson, concurring in *Shepherd v. Florida*, 341 U.S. 50, 55 (1951) described the practice as "one of the worst menaces to American justice." The menace is greater, and the unfairness more manifest, when the accusations are made and circulated by an agency of the Government or by a person enjoying the prestige of official status. See *Basiliko v. State*, 129 A.2d 375 (Md. 1957).

Jurors cannot realistically be expected to set aside or ignore the effects of a publicity campaign of such unparalleled intensity and duration as that involved here. In such a context, the defendant is not required to show actual prejudice on the part of individual jurors; due process can have practical meaning only where courts recognize the existence of prejudice where it must have been present despite the jurors' assertions to the contrary. *Irvin*

v. Dowd, 366 U. S. 717; *Marshall v. United States*, 360 U. S. 310; *Meyer v. Cadwalader*, 49 Fed. 32 (C.C. Pa 1891); *Griffin v. United States*, 295 Fed. 137 (3 Cir. 1924); concurring opinion of Mr. Justice Jackson is *Krulewitch v. United States*, 336 U. S. 440, 453.

The court below has ruled that petitioner presented "no clear and convincing proof of prejudice existing in the mind of any juror" (298 F.2d 629). No such direct showing is possible in this or any other case; but it is submitted that to attribute impartiality to the petit jurors here is so unrealistic as to deprive that concept of all meaning. The lapse of time between indictment and trial did not serve to provide an atmosphere of impartiality. The interval was filled with continuing attacks upon petitioner, all stemming directly or indirectly from the Senate Committee. Petitioner was forced to trial before a jury of persons who must necessarily have been biased against him—either consciously or unconsciously—by the actions of the Committee and the unremitting publicity they evoked.

We submit that the United States should not be permitted to create prejudice and then assert that prejudice has not been "convincingly" shown, where the circumstances and rules of law prevent direct proof of the point.

C. *Absence of Evidence on 990 Counts*

Petitioner stands convicted under the "Form 990" counts in the fact of a total absence of evidence that he saw, or signed, or was aware of, or performed any act whatever to bring about the preparation or presentation of either the 1950 return or the 1952 return. The verdict of guilty can

only be the result of the jury's prejudice against petitioner arising from the pre-trial attacks upon him by the government and from the prosecution's determined concentration upon proving him guilty of the uncharged crime of embezzlement.

The evidence concerning these two counts is readily summarized. Neither of the "Form 990" returns for the Building Association were signed by petitioner. Pl. Exs. 50 and 51. Both were signed by Frank W. Brewster, the Secretary-Treasurer, and by Donald D. McDonald, the bookkeeper. McDonald testified that he made out the returns unassisted, uninstructed, and entirely on the basis of his own assumptions plus a minimal amount of information from John Lindsay, Jr., the building contractor. Tr. 4417-4418, 4458-4565, 4800. The returns were then left in Brewster's office, signed by him and McDonald, and submitted. Tr. 4591. There was "no evidence of any kind that petitioner, in the words of the indictment, "did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation" of either return, or in fact that he ever saw or knew of the existence of either of them. The following is the essence of McDonald's testimony concerning petitioner in this regard:

> Q — "I want to specifically ask you, Mr. McDonald, referring to the 990 Forms for the year 1950, to your knowledge, did Mr. Beck have anything to do with preparing it or signing it?
>
> A — "No, sir.
>
> Q — "And referring to the 990 Form that was submitted to the United States for the year 1952, to your knowledge, did Mr. Beck

have anything to do with preparing it or signing it?

A — "No, sir.

Q — "And that not only includes the actual preparation and signing of the 990 return, but it includes the keeping of the books with respect of it, does it not?

A — "That is right."

Tr. 4828

At the most, the evidence taken as a whole raises only a suspicion that petitioner had a possible motive and opportunity (in his capacity as president of the organization) to commit the offenses charged. *But there is literally nothing in the record to suggest that he in fact did so.* The evidence relied upon by the court below in affirming (298 F.2d 622, 634) comes only to this: Since petitioner generally "directed and controlled" the Building Association, and had "detailed knowledge" of its operation, it may be inferred that he directed the preparation of these particular returns, and had knowledge of their contents, *even though the only evidence of record is precisly to the contrary.*

To affirm a conviction upon this basis violates the elemental requirement of due process that the government must present at least *some* evidence that the defendant *committed an act* in violation of the penal statute. *Thompson v. Louisville*, 362 U. S. 199 (1960). No citizen may constitutionally be imprisoned on the basis of mere suspicion or disbelief in his innocence. A case remarkably similar to this (tried before the same district judge) is *United States v. Pechenik*, 236 F.2d 884 (3 Cir. 1956), where the court reversed the conviction of a corporation president charged with attempting to evade the firm's income tax, and stated:

> "The defendant . . . left the books, bookkeeping and preparation of tax returns to the bookkeeper and account. . . . It is suggested by the government that it is incredible that the defendant did not know all along that capital expenditures were improperly treated; hence he knew the corporation tax returns were false. . . . But disbelief does not supply proof that the defendant participated in, directed, or knew the books were kept incorrectly."

Where the evidence in a criminal case is circumstantial — as all of it is here — due process requires that it be such as to exclude every reasonable hypothesis other than guilt. *Brooks v. United States*, 164 F.2d 152 (5 Cir. 1947). The evidence in this case does not begin to approach that standard, or even the rock-bottom requirements of *Thompson v. Louisville*, Supra. Here, the verdict against petitioner on the 990 counts, in the face of direct evidence of his innocence, serves only to further demonstrate that petitioner was forced to trial in an atmosphere of conscious or subconscious prejudice.

The evidence on the 990 counts was complicated by the fact that practically all of the trial was devoted to the admission of evidence on the tax evasion counts. The government introduced this evidence on the theory that the unreported funds had been embezzled, and the jury was doubtless prejudiced by this supposed commission of another crime.

Following the decision in *James v. United States*, 366 U. S. 213, the government submitted a supplemental brief to the Court of Appeals, contending that some or all of the unreported receipts *were not* embezzled, but were unused expense monies, or funds to which petitioner believed himself entitled.

Although the Court of Appeals referred to the receipts as "an amazing series of embezzlements" (298 F.2d 626), it also agreed that the government might have proved, under proper instructions, that the unreported funds were in fact merely compensation for services (295 F.2d 630).

Although the jury verdict, under the instructions, implies a finding of embezzlement, petitioner has never agreed that the funds were in fact embezzled. Accordingly, the government, upon retrial of the evasion counts, will seek to prove that the receipts were taxable compensation.

If there is to be a new trial on the evasion counts, petitioner should *at the very least* be granted a retrial of the 990 counts, so that a jury can consider these charges not in the context of a claimed crime of embezzlement, but in the light of the theory which the government now proposes—i.e., mere failure to report taxable income.

This point was raised and argued in the Court of Appeals, but was not discussed in that court's opinion.

IV. CONCLUSION

It is respectfully submitted that the acts of the Senate Committee impaired the validity of the grand jury proceedings and that the indictments should have been dismissed.

Petitioner's motion for a directed verdict and acquittal on the 990 counts should have been granted.

In the alternative: because of adverse publicity continuing until the month of trial, petitioner's

motion for a continuance should have been granted; and a new trial should now be granted on the 990 counts.

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